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Supreme Court of the United States

OCTOBER TERM, 1957

No. 800 & 815

In the Matter
of the
Petition of SKIBS A/S JOLUND, in a cause of exoneration from or limitation of liability for damages arising out of a fire on board the "BLACK GULL" on July 18, 1952.

SKIBS A/S JOLUND,
Petitioner.

BLACK DIAMOND STEAMSHIP CORP.,
Petitioner,

vs.

AMERICAN SMELTING & REFINING COMPANY, *et al.*,
Respondents.

BLACK DIAMOND STEAMSHIP CORP.,
Petitioner,

vs.

MARIA ANGELINA VERBEECK, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO THE PETITIONS FOR A WRIT OF CERTIORARI

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Skibs A/S Jolund, owner of the S. S. "Black Gull", and Black Diamond Steamship Corporation, the charterer of that vessel, have filed petitions for a Writ

of Certiorari. We shall consider the arguments set out in the respective petitions.

The decision of the Court of Appeals did not determine the present petitioners' liability or non-liability to the respondent cargo owners and death claimants. That Court held that certain findings of the District Judge are clearly wrong; and that these insupportable findings caused the District Judge to omit reaching any conclusion on the two most vital issues of the case: (1) Was it negligent to omit covering the dangerous deck load of napthalene; (2) If so, was the negligence the cause of the fire. The Court of Appeals thereupon directed the District Court to pass upon these two issues (23a)* and set out the principles which govern findings of negligence and proximate cause under the facts of this case (24a-25a).

To us the petitions for certiorari seem premature. Moreover, we shall point out *infra* that although the petitioners attempt to find an issue of law to present to this Court, they really are asking a review of questions of fact which interest only the parties to this litigation.

Petition of Black Diamond Steamship Corporation

We shall deal with the "Questions Presented" as they appear in the petition.

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* All references in parentheses are to the Appendix of the petition of Black Diamond Steamship Corporation.

Question 1

The question here advanced primarily relates to the burden of proof under the statutory exception from liability for fire provided by the Carriage of Goods By Sea Act (46 U. S. C. Sec. 1304 (2) (b)). The cargo owners admitted in the District Court and in the Court of Appeals that they have the burden of proving that the destruction by fire of their property resulted from the negligence of one or more of this petitioner's managing representatives. The Court of Appeals did not hold or suggest anything to the contrary, as is urged in the petition. The arguments which this petitioner advances as to the burden of proof (at p. 8 of the petition) and as to the necessity of a causal relationship between proven negligence and the fire (at p. 13), are without point for neither court below nor counsel has suggested anything to the contrary.

The Court of Appeals held that fire resulting from negligent omission of a protective covering over the dangerous deck cargo of napthalene would, on the uncontradicted evidence, result from negligence of one of this petitioner's managing officers (20a-22a).

Question 2

The petitioner asserts that there is absence of proof as to the cause of the fire and for that reason the Court of Appeals was not justified in sending the case back for further proceedings.

The District Court had found that the fire resulted either from spontaneous combustion or from an ex-

ternal igniting agency (3a, 5a). Indeed, it could hardly be anything else. The cargo owners argued that the evidence establishes that the fire could not have been spontaneous and it is apparent that the Court of Appeals was inclined to agree (23a). However, it did not pass on that issue definitely (23a), for it held that whichever may have been its cause, the undisputed evidence establishes that the absence of a protective covering could well have been proximately related to the outbreak of the fire (15a, 23a).

Questions 3 and 4

The petitioner urges that the findings of the District Court are not so clearly erroneous as to warrant a remand by the Court of Appeals. Under Question 1 the petitioner asserted that the Court of Appeals misread the evidence "and substituted its evaluation of the evidence for that of the District Court." Under Question 4 the petitioner argues that there is credible evidence supporting the findings of the District Court.

There is no question of "evaluation" of the evidence. As the Court of Appeals pointed out, on one key issue there is no evidence whatever supporting the finding below: the only evidence on the issue negatives the finding made (17a-19a, 31a). On another key issue the District Court overlooked the actual evidence and made its finding based on evidence which it thought was there but which never existed (15a-16a, 32a).

In a courteous effort to soften the impact of its conclusion that the District Court's findings are

clearly wrong, the Court of Appeals advanced possible explanations as to how the District Judge may have been led into error. The petitioner seeks (at p. 6) to take advantage of the Court's courteous language by arguing that it reached its conclusions "not on the basis of certainty but on the basis of appearances, apparent mistakes and assumed failures."

In *McAllister* v. *U. S.*, 348 U. S. 19, this Court held (at p. 20):

> "'the Court of Appeals may not set aside the judgment below unless it is clearly erroneous.' * * * A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed' * * *."

In the present case the Court of Appeals held that on key issues the findings below are "clearly erroneous": there is no evidence supporting them while there is evidence negativing them.

It appears in this petition (footnote on p. 3) that the right of recovery of the widow and children of the libellant-seaman who lost his life in the fire, is assumed to be governed by the same principles as control the rights of inanimate cargo. The same assumption was made by the District Court (1a) and resulted in that Court's apparent conclusion that the Carriage of Goods By Sea Act controlled the loss of life claim (3a, 5a).

While the right of recovery of the family of the deceased Belgian seaman who lost his life on the high

seas in the fire on the Norwegian S.S. "Black Gull", is dependent on a finding of negligence, statutory exceptions relating to cargo are of course inapplicable; and the negligence of any minor employee will serve to establish the petitioner's liability.

Petition of Skibs A/S Jolund

The owner of the "Black Gull" does not present any question of law for this Court's consideration. This petitioner, by constant reiteration, stresses that the courts below have not definitely decided whether the fire was spontaneous or resulted from an external igniting agency; and, it is urged, that it is cargo's burden to establish the cause of the fire.

While the Court of Appeals did not think it probable that the fire in the deck load of napthalene was spontaneous (23a), it held that, whatever its cause, the absence of a protective covering over this dangerous cargo could well have brought about the disaster. The case was remanded to give the District Court opportunity to consider the key issues which it had not considered because of its findings which the Court of Appeals found are clearly wrong.

The argument of this petitioner (at pp. 18-20) that the evidence establishes a practice to violate the standard of due care which the Court of Appeals found was controlling, does not, we think, require much consideration.

The Court of Appeals held that the United States Coast Guard Regulations and a Dutch regulation, established by the evidence as controlling, provide a

standard of due care (24a). This petitioner argues that the testimony of the opinion witnesses which it persuaded to testify, should be considered to be more persuasive than the government regulations mentioned. Moreover, it asserts (at p. 17) that the Court of Appeals adopted "a distorted reading" of the Coast Guard regulation concerning napthalene.

The Court of Appeals pointed out (at pp. 32a-33a) that it is the petitioners who "distort" the language of the Coast Guard Regulation which clearly required that a deck load of napthalene be covered by awnings, dunnage or tarpaulins.

Consideration of this petitioner's argument that the evidence does not establish the existence of the Dutch regulation concerning napthalene which the Court of Appeals found was a standard, would require this Court to examine the factual evidence in the case. The regulation was established by the testimony of a Dutch lawyer and by a letter addressed by the Dutch authorities to the petitioner, Black Diamond Steamship Corporation, enclosing a copy of the regulation (Pet. Ex. W). We find somewhat strange this petitioner's argument (at p. 19) that this letter enclosing the regulation should not be considered because neither the writer nor receiver testified in the case. The letter, with enclosure (Pet. Ex. W), was addressed to the Rotterdam agent of petitioner, Black Diamond, and was offered in evidence by petitioner, Skibs A/S Jolund.

This petitioner argues (at p. 13) that although respondents have had their day in court, neither court

below "can say on the record that they sustained their burden of proof. What, then, is the justification for further proceedings?" It then argues that the effect of the decision of the Court of Appeals is to reverse the established law as to the burden of proof under the statutory fire exemptions.

Both courts below and the present respondents have always recognized that it is cargo's burden to prove that its destruction by fire was causally related to the negligence of managing officers of the vessel-owner or charterer. Because of the District Court's manifest errors, as found by the Court of Appeals, the former court did not pass upon the vital issues of the case and the Court of Appeals directed it to do so.

We find it difficult to understand why either petitioner feels that this Court should grant a petition for certorari to consider this case in its present posture.

CONCLUSION

We submit that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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